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No. 07-48

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,

Petitioners,

v.

STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY,

Respondent.

Petition for Writ of Certiorari to the Oregon Court of Appeals

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BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

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QUESTIONS PRESENTED

In this case, the Oregon Court of Appeals analyzed petitioners' regulatory takings claim that was brought under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), by using the "whole parcel" rule that this Court employed in that case and that the Court subsequently has reaffirmed. Although petitioners suggest that there is some conflict between what the state appellate court did and this Court's post-*Penn Central* case law, in fact there is no conflict. Petitioners also do not identify any conflict between the state appellate court's "whole parcel" analysis and the analysis employed in *Penn Central* cases by any federal appellate court or state supreme court. In addition, petitioners misstate some of the facts on which they base their argument. Moreover, it is not clear that the state appellate court would have reached a different result even if that court had not utilized the whole parcel rule.

In sum, this Court already has held that the "whole parcel" rule applies in analyzing *Penn Central* claims; there is no conflict for this Court to resolve; and this case involves nothing more than the case-specific application of settled law to a particular set of facts.

(1) Under these circumstances, should this Court grant certiorari to review the issue of whether the "whole parcel" rule applies when analyzing *Penn Central* claims? A subsidiary question is whether this case is a poor vehicle to use to reexamine the validity of the whole parcel rule where petitioners base their arguments on facts that they skew in their favor, and

where the state court might well have reached the same result in any event even without applying the whole parcel rule.

Petitioners had a jury trial in state court. Special verdicts were returned by the jury. The state appellate court determined that some of those verdicts were not controlling on the court because they did not consider the parcel as a whole, but rather focused on only a part of it. The court also concluded that some of the verdicts represented legal conclusions or findings of ultimate fact, rather than findings of historical fact.

(2) In this situation, should this Court grant certiorari to consider whether the state appellate court erred in its treatment of the particular, and in some respects rather unusual, jury verdicts returned in this case and, if so, whether that interfered with any federal constitutional right to a jury trial that petitioners may have in this inverse condemnation case?

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The decision of the Oregon Court of Appeals is reported. *Seiber v. State of Oregon*, 219 Or. App. 215. 149 P.3d 1243 (2006). The Oregon Supreme Court's order denying review can be found at *Seiber v. State of Oregon,* 342 Or. 633, 157 P.3d 788 (2007).

STATEMENT OF THE CASE

Petitioners own and live on a property of about 200 acres, much of which contains commercial timber. (Tr. 189).[1] The property was inherited in 1986. (Tr. 189). The timber on the property is second-growth. The property was clear cut in the 1930s or 1940s. (Tr. 190, 269). In 1970, the federal government listed the Northern spotted owl as a threatened species. (Tr. 79-80). In 1990 and 1991 respectively, the state Board of Forestry adopted first temporary and then permanent rules requiring that a 70-acre area be protected around a spotted owl nest site. (Tr. 81-83). A 70-acre area is needed to protect young owls because they often jump out of the nest before they can fly, and hop and move around on the ground, where they are vulnerable to predators such as great horned owls. (Tr. 162-63). The state has retained that 70-acre requirement because there is no research indicating that a smaller area will suffice to protect the owls. (Tr. 93).

An owl pair began nesting on a neighboring property in 1992. (Tr. 141). The owls nested on that

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[1] The citation is to the transcript of the state court proceedings.

neighboring property in 1994. (Tr. 141). They were heard in the area in 1995 and 1996, although not in 1997, but they did not nest again. (Tr. 142). In 2000, the female owl was seen in the area, about two miles away. (Tr. 143).

In 1994, Mrs. Seiber had a conversation with a state forestry official. At that time, she wanted to log about 40 to 50 acres on her property, but she was told that she would not be able to do that because of the presence of the spotted owls. (Tr. 194-95). She did not submit any formal notification of her intent to log the area, however. (Tr. 208-09). If she had submitted an application or notification, it would have been denied. (Tr. 109-10). In 1998, she submitted an application to log within the so-called "core area" designed to protect the owls (Tr. 111, 125). It was denied. (Tr. 126).

In August 2001, petitioners were told that they could log in the 40-acre area in which logging had been denied. (Tr. 205). The restriction on logging can be lifted once owls have not been seen for five years, and that time had passed. As of February 2003, however, petitioners had not removed downed trees from the 40-acre area. (Tr. 395). Throughout the period from January 1994 until August 2001, petitioners harvested timber from other portions of their property. (Tr. 120-24, 154-56, 379-82).[2]

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[2] Additional facts will be set out in the discussion *post*.

REASONS FOR DENYING THE PETITION

Petitioners assert that this Court should grant certiorari because the case presents "an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." (Pet. Cert. 8). With regard to the question of whether the "whole parcel rule" applies to claims brought under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), petitioners suggest that this Court has not settled that issue, and that the state appellate court's conclusion that the rule applies when analyzing *Penn Central* claims is contrary to this Court's decisions. On the contrary, however, this Court repeatedly has held that the whole parcel rule applies when evaluating regulatory takings claims under the *Penn Central* framework. In reaching that same conclusion in this case, the state appellate court followed this Court's settled precedent.

Petitioners do not even attempt to show any conflict between the state appellate court's whole parcel analysis and the decisions of any federal court of appeals or any state supreme court. At one point, they note that a factor that may weigh in the decision whether to grant certiorari is whether "a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals." (Pet. Cert. 8, citing Rule 10(b)). But petitioners never purport to identify any decision of any federal court of appeals that is contrary to the state appellate court's decision in this case.

Because, with respect to petitioners' attack on the whole parcel rule, the state appellate court simply applied settled law to the facts of this case, there is no reason for this Court to grant the petition. In addition, petitioners misrepresent (or at least skew) some of the facts on which they rely. Furthermore, the state appellate court might have reached the same result even if it had not applied the whole parcel rule.

Petitioners also complain that they were denied their right to a jury trial in state court in this inverse condemnation case. (Pet. Cert. 16). While it is not clear that they have such a federal right in state court, in fact they had a jury trial. Their real complaint is that they disagree with the state appellate court that certain special verdicts returned by the state court jury represent legal conclusions or, at the most, findings of ultimate fact, rather than findings of historical fact. This Court's treatment of similar questions indicates that the state appellate court did not err. Furthermore, the special verdicts submitted to the jury in this case are at least in some respects unusual and idiosyncratic. Thus, the jury-verdict issue as presented in this case is not apt to have broad effect.

A. The state appellate court's use of the whole parcel rule when analyzing petitioners' *Penn Central* claim is consistent with this Court's decisions, and creates no conflict.

In this case, the state Court of Appeals relied on the "whole parcel" rule when considering petitioners' regulatory takings claim based on *Penn Central.* (Pet. Cert., App. C 9a-13a). Petitioners contend that the

state court erred because, according to them, "the 'whole parcel' rule does not apply to a claim under the *Penn Central* line of cases." (Pet. Cert. 9) (initial capitals and boldface omitted). Petitioners grudgingly admit that *Penn Central* itself seems to adopt that rule, although they describe that aspect of this Court's decision as "dicta." (Pet. Cert. 10). But they argue that "this Court's cases following *Penn Central* indicate that the 'whole parcel' rule does not apply to claims under *Penn Central*." (Pet. Cert. 11). This Court's case law, however, refutes their contention.

In *Penn Central*, this Court acknowledged that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case,'" and involves "essentially ad hoc, factual inquiries[.]" 438 U.S. at 124, quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (bracketed material in *Penn Central*). Nevertheless, the Court outlined some of the "factors that have particular significance" when analyzing what has come to be known as a *Penn Central* regulatory-takings claim.

> The economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. * * * So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be charac-

> terized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124 (additional citation omitted).

Later in its opinion, this Court embraced the whole parcel rule.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* — [there] the city tax block designated as the "landmark site."

Id. at 130-31 (emphasis added). The whole parcel rule is based, at least in part, on the recognition that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal, Inc. v. Construction La-*

borers Pension Trust for Southern Cal., 508 U.S. 602, 644 (1993).

And this Court's language adopting the whole parcel rule is not "dicta," as petitioners contend. This Court was rejecting Penn Central's claim that the loss of its "'air right' above" Grand Central Terminal should be considered separately. Instead of that narrow focus, when considering whether a taking had been effected this Court considered the parcel as a whole, that is, "the city block designated as the 'landmark site'" by the city. *Id.* at 131.

It is true that subsequently in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), this Court expressed some uncertainty about the whole parcel rule. The Court observed that:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, *see, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); but we have at times expressed discomfort with the logic of this rule, *see Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003,] 1016-17 n. 7 [(1992)] * * *.

Palazzolo, 533 U.S. at 631 (other citations omitted).

But that observation *is* merely dictum. The Court did "not explore the point" any further in that case. *Id.* And, later in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court unambiguously reaffirmed the cen-

tral role of the whole parcel rule when analyzing a *Penn Central* claim. In *Tahoe-Sierra,* the Court noted that

> Justice Brennan's opinion for the Court in *Penn Central* did * * * make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases *we must focus on " the parcel as a whole*[.]"

Tahoe-Sierra, 535 U.S. at 326-27 (emphasis added; quotation from *Penn Central* and citation omitted). In other words, this Court requires "that the aggregate must be viewed in its entirety[.]" *Id.* at 327 (internal quotation marks omitted). Based on that same principle, it is not enough to effect a regulatory taking if one stick out of the bundle of property rights is affected or impaired by a regulation. The Court has affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.*, quoting *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).

In *Tahoe-Sierra*, petitioners argued that a compensable taking had occurred, relying on a temporal segmentation of their property and focusing on time periods when moratoria on development were in effect. This Court rejected that approach, reaffirming *Penn Central*'s whole parcel approach.

> Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases *we must focus on*

> *"the parcel as a whole."* 438 U.S. at 130-31. We have consistently rejected such an approach to the "denominator" question. *See Keystone,* 480 U.S. at 497. *See also Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question").

535 U.S. at 331 (emphasis added).

Thus, contrary to petitioners' assertion that "this Court's cases following *Penn Central* indicate that the 'whole parcel' rule does not apply to claims under *Penn Central*" (Pet. Cert. 11), this Court's decisions, and in particular its decision in *Tahoe-Sierra*, point in precisely the opposite direction. The Court repeatedly and consistently has applied the whole parcel rule in *Penn Central* cases. Petitioners, in effect, ask this Court to upset and overturn long-settled law.

In arguing that the whole parcel rule is somehow inconsistent with this Court's takings jurisprudence, petitioners also rely on decisions from this Court that they claim "make clear that *Penn Central* provides a distinct theory of recovery that does not require a plaintiff to prove that his or her 'whole parcel' of property was affected by government regulation." (Pet. Cert. 10). For that proposition, petitioners rely on *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005),

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and *Palazzolo*. (Pet. Cert. 10-11).

There is no doubt that *Chevron*, *Lucas*, and *Palazzolo*, as well as other decisions, including *Penn Central*, make it clear that *Penn Central* "provides a distinct theory of recovery," as petitioners put it. But that a theory of recovery is "distinct" hardly demonstrates what the components of that theory are. And none of those decisions, or any other decision of which the State is aware, holds, as a matter of federal law at least, that a *Penn Central* claim does "not require a plaintiff to prove that his or her 'whole parcel' of property was affected by government regulation," to again quote petitioners.[3]

As it came before this Court, *Lingle* did not involve a *Penn Central* claim. The Court remanded so that claim, as well as others, might be considered by lower courts. 544 U.S. at 548. *Lingle* says nothing that indicates that whole parcel analysis does not apply to *Penn Central* claims. In the footnote in *Lucas*, on which petitioners rely (Pet. Cert. 10), this Court simply recognized that a *Penn Central* claim is a possible alternative to a *Lucas* claim that a regulation

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[3] Actually, petitioners' assertion is a bit off the mark in another respect as well. The issue is not whether a plaintiff must prove that her whole parcel *was affected* by government regulation, but rather whether, when the whole parcel is considered in the calculus, a *Penn Central* regulatory taking has occurred.

has deprived the claimant of all economically beneficial use of his property. 505 U.S. at 1019 n. 8. Nothing in that observation undermines or calls into question the whole parcel rule. Finally, in *Palazzolo* the Court did not hold "that the plaintiff could proceed under a *Penn Central* theory, even though he was only prohibited from developing a portion of his property," as petitioners contend. (Pet. Cert. 10). Instead, the Court merely recognized again that a *Penn Central* claim proceeds on a theory different from that which applies to a *Lucas* claim. 533 U.S. at 617. And, as noted above, although this Court mentioned the "denominator" question in passing in its opinion in *Lucas*, ultimately the Court did not explore the point. *Id.* at 631.

Despite their initial intimation that there might be a case-law conflict (Pet. Cert. 8), petitioners do not cite a single case from any state or federal court that they contend rejects the whole parcel rule in the context of a *Penn Central* regulatory takings case. And, although it sometimes may be difficult to identify which parcel is the relevant "whole" one,[4] there ap-

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[4] *See, e.g., Dist. Intown Properties Ltd. Partnership v. Dist. Col.*, 339 U.S. App. D.C. 127, 198 F.3d 874, 880 (1999), *cert. denied* 531 U.S. 812 (2000); *Giovanella v. Conservation Comm. of* Ashland, 447 Mass. 720, 857 N.E.2d 451, 456-58 (2006), *cert. denied* 127 S. Ct. 1826 (2007); *Machipongo Land & Coal Co. v.* Commonwealth, 569 Pa. 3, 799A.2d 751, 768, *cert. denied* 537 U.S. 1002 (2002). That problem is not present in this case. Petitioners never have contended that the 40-acre parcel is a property separate from

pears to be no conflict between the state appellate court's whole parcel analysis in this case and the decision of any federal court of appeal or state supreme court. *See, e.g.* , **federal cases**: *Walcek v. United States,* 303 F.3d 1349, 1356 (Fed. Cir. 2002); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988); *Coalition for Gov. Procurement v. Federal Prison Industries,* 365 F.3d 435, 483 (6th Cir. 2002); *Armour and Co. v. Inver Grove Heights*, 2 F.3d 276, 278 (8th Cir. 1993); *MacLeod v. Santa Clara County*, 749 F.2d 541, 546-47 (9th Cir. 1984), *cert. denied* 472 U.S. 1009 (1985); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1079 (11th Cir. 1996), *cert. denied* 522 U.S. 981 (1997). *See also* **state decisions**: *Wonders v. Pima County,* 207 Ariz. 576, 89 P.3d 810, 815 (2004); *Buckley v. Cal. Coastal Com.,* 68 Cal. App. 4th 178, 80 Cal. Rptr. 2d 562, 572 (1998), *cert. denied* 528 U.S. 816 (1999); *Animas Valley Sand & Gravel, Inc. v. Bd. Comm. Plata Cp.,* 38 P.3d 59, 67, 69 (Col. 2001); *Bauer v. Waste Management,* 234 Conn. 221, 662 A.2d 1179, 1197 (1995); *Leon County v. Gluesenkamp,* 873 So.2d 460, 466 (Fla CA 2004); *Greater Atlanta Homebuilders Ass'n v. DeKalb County,* 277 Ga. 295, 588 S.E.2d 694 (2003); *City of Coeur D'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 319-20 (2006); *Dept. of*

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the remainder of their property and that the 40 acres is the whole parcel. Instead, their claim is that the whole parcel rule does not apply in *Penn Central* cases.

Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied* 493 U.S. 1078 (1990); *LaSalle National Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 799 N.E.2d 781, 792 (2003), *appeal denied* 208 Ill.2d 539, 809 N.E.2d 1287, *cert. denied* 543 U.S. 984 (2004); *Fitzgarrald v. Iowa City*, 492 N.W.2d 659, 665-66 (Iowa 1992), *cert. denied* 508 U.S. 911 (1993); *McPherson Landfill, Inc. v. Board of County Comm'rs.*, 274 Kan. 303, 49 P.3d 522, 540 (2002); *Seven Islands Land Co. v. Maine Land Use Reg. Comm.*, 450 A.2d 475, 482 (Me. 1982); *City of Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000, 1022-23 (2000); *Giovanella v. Conservation Comm. of Ashland*, 447 Mass. 720, 857 N.E.2d 451, 456-58 (2006), *cert. denied* 127 S. Ct. 1826 (2007); *K & K Construction, Inc. v. Dep't Natural Resources*, 456 Mich. 570, 575 N.W.2d 531, 536, *cert. denied* 525 U.S. 819 (1998); *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 114-15 (Minn. 2003); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 855 P.2d 1027, 1035 (1993); *Quirk v. Town of New Boston*, 140 N.H. 124, 663 A.2d 1328, 1332-33 (1995); *Smith v. Mendon*, 4 N.Y.3d 1, 822 N.E.2d 1214, 1221 (2004); *Machipongo Land & Coal Co. v. Dept. of Envtl. Prot.*, 569 Pa. 3, 799 A.2d 751, 768, *cert. denied* 537 U.S. 1002 (2002); *Wild Rice River Estates. Inc. v. City of Fargo*, 705 N.W.2d 850, 855-56 (N.D. 2005), *cert. denied* 126 S. Ct. 2039 (2006); *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1082 (R.I. 1997); *Sea Cabins on the Ocean v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 603 (2001); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 256 n. 16 (Utah App. 1998); *In re Interim Bylaw, Waitsfield*, 170 Vt. 541, 742 A.2d 742,

744 (1999); *Presbytery of Seattle v. King Co.*, 114Wn.2d 320, 787 P.2d 907, 915, *cert. denied* 498 U.S. 911 (1990); *R.W. Docks & Slips v. State*, 244 Wis.2d 497, 628 N.W.2d 781, 789, *cert. denied* 534 U.S. 1041 (2001); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 730-31 (Wyo. 1985), *appeal dismissed* 476 U.S. 1110 (1986).

Thus, there is no case law conflict for this Court to resolve. Petitioners in reality ask this Court to grant certiorari to review the application of settled case law to a particular set of facts.

In sum, in claiming that this Court's decisions undermine the *Penn Central* whole parcel rule, petitioners seek to minimize the decisions that are flatly inconsistent with their position, rely on dictum, and attempt to derive from the unremarkable observation that a *Penn Central* claim is distinct from other regulatory takings theories the unprecedented rule that the whole parcel doctrine does not apply to such claims. In *Penn Central* and *Tahoe Sierra* (and in other decisions), this Court already has resolved the legal issue petitioners present to the Court. The Court has held that the whole parcel rule applies to *Penn Central* claims. Petitioners have identified no unresolved issue that warrants this Court's attention, and there is no conflict amongst the decisions of this Court or between the decision of the state Court of Appeals and that of any other court, state or federal. This Court should deny the petition.

B. In any event, petitioners misstate or skew some of the facts on which they rely, and this case would be a poor vehicle for review.

Petitioners contend that "[t]he record in this case provides a sound foundation upon which the Court can clarify the law." (Pet. Cert. 12). They also assert that "[t]he Oregon Court of Appeals' result would have been different if it had used the correct standard." (Pet. Cert. 13). The accuracy of both of those assertions is doubtful.

Petitioners' contentions are grounded on certain factual claims: (1) "they lost significant income because many of the trees in the protected area became infected with root rot that caused them to blow down during the seven years that the logging ban was in effect" (Pet. Cert. 13); (2) although the state appellate court believed petitioners "'were free to sell future contingent logging interests,' 149 P.3d at 1247," in actuality there was no such market (Pet. Cert. 13); and (3) "the subject regulation singles Petitioners out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands." (Pet. Cert. 13). In support of that last claim, petitioners note, accurately, that spotted owls generally prefer old-growth forest, and they intimate, incorrectly, that they have been "singled out" because they have such forests, while their neighbors have been free to cut their timber and escape spotted-owl regulation. (Pet. Cert. 15-16).

At best for petitioners, each of those claims is questionable. To take the last one first, at trial everyone agreed that petitioners do not have old-growth

timber on their land. (Tr 54, 190). Instead, the timber was clear cut in the 1930s or 1940s. And, thus, there is nothing about the age of petitioners' timber that sets them apart from neighboring landowners (not that the record reveals anything about when any of them may have cut their timber). And there is nothing to show that petitioners have been "singled out." After all, in this case the owl nest site was not on petitioners' land, but on the land of a neighboring landowner, who also was subject to the temporary restriction on logging in the affected area. The record does not indicate how many other landowners in the area may have been subject to similar restrictions (although petitioners cite an Oregon atlas indicating that owl populations within the western Oregon Cascades spotted owl "province" are "moderately high"). (Pet. Cert. 14 n. 2, quoting *Atlas of Oregon* 51 (2d ed. 2001)).

And petitioners exaggerate both the extent of the blow-down problem in the "core area" on their property that was protected for the owls and their eagerness to address that problem. At trial, expert plant pathologists testified that there was relatively little evidence of laminated root rot in that area of petitioners' property. (Tr. 560-61, 564-65, 584-85). The infestation spreads very slowly. (Tr. 562). In addition, petitioners have known about the root rot since 1988, but had not managed to clean out the affected trees before 1994, when they first were told they could not log in the affected area. (Tr. 214-15). As noted, the logging restriction was lifted in August 2001. Yet, as of February 2003, petitioners had not removed the rotted trees from the area. (Tr. 395). Thus, the impact

of the regulation on even this limited portion of their property is less than they suggest, and it is not clear that it was the regulation, as opposed to petitioners' own delay, that prevented them from removing any diseased logs earlier.

Finally, it is not clear that the state appellate court erred in suggesting that petitioners "were free to sell future contingent logging interests." 149 P.3d at 1247. Without any record citation, they contend that they "presented evidence that there was no market for future interests from such a small parcel." (Pet. Cert. 13). But the State presented evidence that such a market might exist. (Tr. 462, 503).

In sum, it is not clear that the state appellate court's decision "would have been different if it had used the [purportedly] correct standard" (Pet. Cert. 13), by which petitioners mean if the court had considered not the whole parcel, but the approximately 40 acres subject to the temporary limitation on logging. Even looking solely at that limited portion of petitioners' property it is not at all clear that a *Penn Central* taking was effected. That uncertainty counsels against a grant of the petition in this case. If the state court would have reached the same result even under petitioners' proposed standard, there is no need to consider the broader legal question pressed by petitioners in this Court, which becomes merely abstract.

A final point remains with respect to whether this is the right case in which to consider petitioners' arguments. Petitioners' arguments are based, at least in part, on the assertion that "the whole parcel rule should not apply in this instance, when the taking

involves, not the land as a whole, but a distinct and separate natural resource on the land." (Pet. Cert. 11). Petitioners suggest that they had a separate property right in their uncut timber. Even if that were true, as noted above this Court has held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe-Sierra*, 535 U.S. at 327, quoting *Andrus*, 444 U.S. at 65-66. In any event,

> [u]nder Oregon law, * * * timber is part of the underlying real property unless it is subject to a contract to be cut. ORS 71.1070(2); *see Paullus v. Yarbrough*, 219 Or 611, 637, 347 P2d 620 (1959) (timber constitutes goods under Uniform Sales Act when agreement to sever timber exists). In this case, no contract to cut the timber existed, and no basis exists, as a matter of state property law, for viewing plaintiff's property interest in the timber as separate from its interest in the real property.

Coast Range Conifers v. Board of Forestry, 339 Or. 136, 150-51, 117 P.3d 990 (2005) (footnotes omitted).

Thus, as a matter of state property law, petitioners do not have a separate and distinct property interest in their uncut timber, which, during the pertinent time period, was not the subject of any contract to cut it. Once again, a premise that underlies petitioners' arguments is false. Even if this Court were inclined to grant the petition to reexamine the whole

parcel rule, this case would be a poor vehicle to use to undertake that reexamination.

C. Petitioners were not denied any right to a jury trial.

Petitioners contend that they have a federal constitutional right to a jury trial in a takings case in state court. (Pet. Cert. 16). Although they admit that they have no Seventh Amendment right to a jury trial in an inverse condemnation case in state court (Pet. Cert. 16), *see Montgomery v. Del Monte Dunes*, 526 U.S. 687, 719 (1999) (Seventh Amendment does not apply to suits brought in state court), they attempt to cobble together such a right from "the Seventh Amendment, together with the Fifth Amendment[.]" (Pet. Cert. 16). It may be doubtful whether that alchemy creates any federal constitutional right to a jury trial in a state court case such as this one. Petitioners cite no case recognizing such a right.

But, in any event, the question is of nothing more than academic interest in this case because petitioners had a jury trial in state court. Their complaint, more accurately, is that the state Court of Appeals disagreed with them about whether certain special verdicts returned by the state court jury amount to findings of fact.

The special verdicts in this case consisted of the following questions and answers.

> Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect?

Answer: Yes.

Question 2: Did the subject regulation advance a legitimate state interest:

(a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole?

Answer: Yes.

(b) Did it require plaintiffs to provide nesting habitat if they were not the cause of the spotted owl being listed as a species threatened with extinction?

Answer: Yes.

Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species?

Answer: No.

Question 4: What was the fair market value of the subject 40 acres of timber in January 1994?

Answer: $333,000.

> Question 5: What was the fair market value of the subject 40 acres of timber in August 2001?
>
> Answer: $258,000.

(Pet. Cert. 6-7, App. M).

The Oregon Court of Appeals determined that "[t]he jury's answers to questions 1, 4, and 5 are, indeed, findings of historical fact that are supported by evidence in the record." (Pet. Cert., App. C 11a). "In light of the 'whole parcel" rule, however, the answers to those questions are of limited relevance because they do not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of plaintiffs' entire 200 acres." (Pet. Cert., App. C 11a-12a). "Question 2, by its phrasing, applies to plaintiffs' *Agins* [*v. Tiburon*, 447 U.S. 255 (1980),] claim, which, [the court had] decided, cannot survive *Lingle*." (Pet. Cert., App. C 12a).

> In any event, part (a) of question 2 does not ask for a determination of historical fact. By asking whether plaintiffs' burden "should" have been borne by the public, the question asks for a legal conclusion or, at the most, a finding of ultimate (as opposed to historical) fact. Part (b) of question 2 is, of course, indisputable: nobody ever asserted that plaintiffs are responsible for the endangered status of the spotted owl. Question 3, like question 2(a), does not call for a finding of historical fact; rather, it re-

> quires the jury to weigh the plaintiffs' economic harm, including their investment-backed expectations, against the public benefit to be derived from the survival of the spotted owl as a species. *That is precisely the legal issue that the court must decide based on undisputed historical facts. Coast Range Conifers*, 339 Or at 155.

(Pet. Cert., App. C 12a) (emphasis added).

The court then turned to that ultimate issue. The court concluded that the regulation did not effect a physical appropriation of petitioners' property, and that it was "part of a regulatory plan developed to ensure maintenance of forestland 'consistent with sound management of * * * wildlife resources and scenic resources * * * and to ensure the continuous benefits of those resources for future generations of Oregonians.'" (Pet. Cert., App. C 12a, quoting Or. Rev. Stat. § 527.630(1)) (ellipses in Court of Appeals opinion). "Therefore, the character of the government actions does not weigh heavily in plaintiffs' favor." (Pet. Cert., App. C 12a, citing *Penn Central*, 438 U.S. at 124). "On the facts presented, viewed in light of the 'whole parcel' rule that is now the governing principle in both Oregon and federal takings cases," the court "conclude[d] that the temporary deprivation of logging rights to 20 percent of plaintiffs' property, pursuant to a statutory and regulatory plan to preserve resources for 'future generations of Oregonians,' was not a taking." (Pet. Cert., App C 12a-13a).

In arguing that the state Court of Appeals erred in its treatment of the special verdicts, petitioners' approach generally is to distort what the court did. According to petitioners, the state appellate court "ignored the jury's findings and determined for itself whether Petitioners had been deprived of all economically viable use of their property." (Pet. Cert. 17-18). And "the court [supposedly] rejected the jury's findings on Questions 1, 4, and 5[.]" (Pet. Cert. 18). The court, "in a feat of legal legerdemain, then proceeded to determine for itself that the parcel as a whole was not denied all economically viable or productive use. When it made that determination, the court usurped the jury's function and denied Petitioners their constitutional right to a jury trial as to that factual issue." (Pet. Cert. 18).

Of course, that is not what the state appellate court did. It did not "ignore" or "reject" any of the jury's answers to the special verdict questions. The court simply observed, correctly, that because questions 1, 4, and 5 all focused solely on the 40-acre parcel, they were "of limited relevance because they [did] not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of plaintiffs' entire 200 acres." (Pet. Cert., App. C 11a-12a). That is, they deviated from the whole parcel rule. The jury simply made no finding regarding whether petitioners had been deprived of all beneficial economic value in their whole 200 acre parcel. Thus, contrary to petitioners' suggestion (Pet. Cert. 17), the state appellate court's decision is not contrary to this Court's decision in *Del Monte Dunes,* in which this Court held that the issue of "whether a landowner has been deprived of all eco-

nomically viable use of his property," although a mixed question of law and fact, "is a predominantly factual question" to be decided by a jury. 526 U.S. at 720. In this case, the jury had not answered the correct question.[5]

In any event, it is somewhat outrageous for petitioners to accuse the state appellate court of, "in a feat of legal legerdemain, then proceed[ing] to determine for itself that the parcel was a whole was not denied all economically viable or productive use." (Pet. Cert. 18). Near the close of trial, petitioners' attorney agreed to "stipulate that they [that is, petitioners] were not denied all economic value of 200 acres. *That's not an issue. We've got all kinds of evidence of that.*" (Tr. 685) (emphasis added). Furthermore, that is not what the state appellate court decided. It was resolving a *Penn Central* claim, not a *Lucas* claim. Instead, the state court decided, applying the *Penn Central* factors, that petitioners had failed to prove a *Penn Central* claim.

And, as the state appellate court correctly decided, that is a legal issue for the court. As the Oregon Supreme Court recognized in its *Coast Range Conifers* decision, "[i]n determining whether a regulatory taking had occurred, the *Penn Central* Court weighed those factors [it identified] and other factors based on the historical facts that the state court had found. *The Court did not remand the case so that a trier of*

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[5] In addition, petitioners do not pursue their *Lucas* claim in this Court.

fact could weigh those factors." 339 Or. at 155 (emphasis added). "*Penn Central* makes clear that the question whether the undisputed facts establish that a challenged regulation effects a taking presents a question of law for the court." *Id.*

Furthermore, even if the state court had erred, this case would be a poor vehicle to use to consider petitioners' jury trial claim. To put it mildly, at least some of the jury questions submitted in this case are idiosyncratic and not apt to appear in other cases. For example, the jury was asked whether petitioners had been required to provide nesting habitat for owls "if they were not a cause of the spotted owl being listed as a species threatened with extinction[.]" Why petitioners should have to be such a "cause" is unclear. The jury also was asked, "[w]hen compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it *necessary* for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species[.]" (Emphasis added). Again, why, in order not to effect a taking, the regulation must be "necessary" to prevent the owls' extinction is not clear. The unusual jury interrogatories submitted in this case make it a poor vehicle for review of the broader jury-trial claim presented by petitioners.

CONCLUSION

For the reasons given above, this Court should not grant the petition for a writ of certiorari.

Respectfully submitted,

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